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No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, OPERATION RESCUE, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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January 22, 1991

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QUESTION PRESENTED

I. Whether respondents' federal claims under 42 U.S.C. § 1985(3) were sufficient to support the district court's exercise of its discretion to take jurisdiction over and render judgment on respondents' pendent state-law claims.

II. Whether the court below was correct in affirming the district court's conclusion that petitioners violated 42 U.S.C. § 1985(3).

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BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

This brief is submitted in opposition to the pending Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals.[1] Respondents are the National Organization for Women ("NOW"), the Virginia, Maryland, and Washington, D.C. chapters of NOW, Planned Parenthood of Metropolitan Washington,

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[1] In the Fourth Circuit, this case was captioned National Organization for Women v. Operation Rescue.

D.C., Inc., and a number of medical facilities that provide gynecological services, including abortions.[2]

The Petition seeks this Court's review of a *per curiam* decision which upheld an injunction against petitioners' physical blockades of medical facilities which provide family planning and gynecological services, including abortions, to women in the Washington metropolitan area. The court of appeals found that petitioners' blockades—referred to by them as "rescues"—violated 42 U.S.C. § 1985(3) (1988) by preventing women who traveled interstate from exercising their federal right to obtain the services of the blockaded clinics. The court of appeals further declined to reverse the district court's exercise of pendent jurisdiction to enjoin state law trespass and public nuisance violations.

The Fourth Circuit's decision as to both the federal and the state claims is squarely in agreement with the decision of the Second Circuit in *New York State NOW* v. *Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). This case dealt with essentially the same conduct by the same parties, and resolved the same claims, as are presented here. It is the only other court of appeals decision in point. Petitioners' tortured attempts to paint a conflict in the circuits by citation to other cases, and to downplay the Second Circuit's decision, do not withstand analysis. This Court denied certiorari in *New York State NOW*, and it should decline to review this similar decision.

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[2] Petitioners' list of respondents omits the Prince William Women's Clinic. Planned Parenthood of Metropolitan Washington, D.C., Inc. is the only respondent that is a corporation. It has no parent or subsidiary corporations.

COUNTER-STATEMENT OF THE CASE

This action was initiated when petitioners publicly threatened to organize and implement "mob" blockades that by force would prevent women from securing medical services at clinics that perform abortions in the Washington metropolitan area.[3] Respondents alleged that petitioners had conspired in violation of 42 U.S.C. § 1985(3) (1988) to deny women their constitutional rights to travel interstate and to choose abortion. In addition, respondents alleged that petitioners also violated state laws forbidding trespassing, creating a public nuisance, and tortiously interfering with business relations.

Finding respondents' federal claim to be substantial and taking pendent jurisdiction over the state claims, District Court Judge T.S. Ellis, III granted emergency relief. Pursuant to Fed. R. Civ. P. 65(a)(2), the court then consolidated the preliminary injunction hearing with trial on the merits. Respondents presented nine witnesses and sixteen exhibits, including evidence of blockades that occurred in Washington, D.C. and Maryland while the hearing was ongoing (despite preliminary orders in those jurisdictions forbidding the blockades). Petitioners called no witnesses and introduced no evidence. The court granted the application for a permanent injunction from the bench

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[3] Respondents brought suit in the District of Columbia seeking declaratory and injunctive relief to prevent such blockades. The district court granted temporary relief in the District of Columbia, but exercised its discretion not to extend relief to portions of the metropolitan area outside the city proper. Respondents then brought parallel suits seeking similar relief in the District of Maryland and the Eastern District of Virginia. Each court has granted injunctive relief.

and subsequently published its findings and conclusions. *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 1483, App. 14a (E.D. Va. 1989).[4]

The district court found that "[s]ubstantial numbers of women" seeking abortion in the Washington metropolitan area traveled from another state to reach a medical facility; for example, approximately 20 to 30 percent of the patrons of the Commonwealth Women's Clinic in Virginia traveled interstate. *Id.* at 1489, App. 22a. The court also found that petitioners had illegally blockaded such facilities so as to bar access by patients. During these events, the court found, petitioners had trespassed on the property of gynecological clinics, destroyed property, defaced signs, blockaded parking lots, and strewn nails throughout parking lots. *Id.* at 1489-90, App. 22a-23a. The facilities were often closed down, patients were denied services, and mass arrests were usually necessary before the facilities could be re-opened. *Id.* at 1489 n.4, App. 22a.

The district court further found that petitioners' activities constituted a threat to the physical and emotional health of the patients. For example, because

[4] Petitioners have continued to blockade medical facilities in the District of Columbia and Maryland, and some of them have been held in contempt. National Organization for Women v. Operation Rescue, No. N89-3098 (D. Md. Nov. 15, 1990) (holding Operation Rescue, Project Rescue, Clifford Gannett, and Joseph Foreman in contempt for violating the court's November 9, 1989 preliminary injunction); National Organization for Women v. Operation Rescue, No. 89-2968-LFO (D.D.C. Jul. 30, 1990) (holding Operation Rescue, Project Rescue, Clifford Gannett, Joseph Foreman, Susan Odom, and Michael McMonagle in contempt).

some abortions require a two-stage procedure, patients must return to the facility for the second stage within a relatively short time frame or risk infection and other potentially serious complications. *Id.* at 1489, App. 21a. A blockade that closed the Hillview Women's Surgical Center in Maryland for most of the day stranded three women in the parking lot who needed this second-stage procedure. These women began to bleed and, like other women placed in life-threatening situations by petitioners' activities, suffered severe emotional trauma. *See id.*

The district court concluded that these activities violated state trespass and nuisance law as well as the constitutional right to travel of women seeking the services provided at the clinics. It further found that, absent an injunction, petitioners' unlawful activities would recur. *Id.* at 1496, App. 37a-38a.

The Fourth Circuit unanimously affirmed *per curiam*:

> "We affirm the judgment because the district court found that the activities of appellants in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law. *See* 726 F. Supp. at 1489, 1492-93. The legal premises under which the district court operated are also consistent with the law of the circuits. . . . [citations omitted]. . . . The Second Circuit has held under similar facts that blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel. *See New York NOW*, 886 F.2d at 1360-61.

* * *

> "In view of our disposition of the federal question raised by appellants we also decline to disturb the district court's refusal to dismiss the state law claims, and we uphold as well its award of costs and attorneys fees."

National Organization for Women v. *Operation Rescue*, 914 F.2d 582, 585-86, App. 8a-9a (4th Cir. 1990).

REASONS FOR DENYING THE WRIT

Petitioners are in effect simply seeking an advisory opinion on the scope of Section 1985(3) for, even if their arguments on this federal question were adopted, the outstanding injunction would remain in place since it is fully supported on independent state law grounds. Petitioners do not attack the merits of the lower court's resolution of the pendent state claims. They argue only that if the federal claim is now determined to lack merit, the district court should then exercise its discretion to reject pendent jurisdiction. However, there is nothing to suggest that the court would do so, and it is of course clear that the federal claim is of sufficient substance to support pendent jurisdiction.

Furthermore, even if intervention by this Court could affect the result in this case, which is doubtful at best, the Petition should nonetheless be denied because the federal questions presented satisfy none of the criteria of Rule 10 of this Court. There is no conflict between the circuits, and, as in *New York NOW*, there is no other basis for granting the writ.

I. THE RESULT BELOW RESTS ON UNCHALLENGED STATE LAW GROUNDS

The uncontroverted evidence presented at trial established, and the district court held, that petitioners violated state trespass and nuisance laws. Petitioners did not challenge the merits of these holdings on appeal and do not contest them here. Thus, if the district court had jurisdiction to decide these claims, intervention by this Court will not affect the result. Under "the ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available," *Hagans* v. *Lavine*, 415 U.S. 528, 546-47 (1974), there is no reason to review the federal questions presented by the Petition.

Petitioners erroneously assert that the Fourth Circuit "explicitly declined to reach petitioners' objection to the exercise of pendent jurisdiction over these claims." Petition for Writ of Certiorari ("Pet.") at 23. To the contrary, the Fourth Circuit's decision "not to disturb the district court's refusal to dismiss the state law claims" affirms the district court's decision to assume pendent jurisdiction over the state law claims. *NOW* v. *Operation Rescue*, 914 F.2d at 586, App. 9a.

Of course, in order properly to assume pendent jurisdiction, a court must determine that the federal questions raised in the complaint are "substantial" and that the state and federal law claims "derive from a common nucleus of operative fact." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Petitioners challenge only the district court's conclusion that respondents' federal claims are substantial.

This Court has repeatedly held that where a claim is not clearly foreclosed by existing precedent, it meets the substantiality requirement:

> "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

Hagans, 415 U.S. at 537-38 (quoting *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973)) (internal quotations omitted).[5]

Here, this test is easily met. *See Roe* v. *Operation Rescue*, 919 F.2d 857, ___ (3d Cir. 1990) (finding federal claims sufficient to support pendent jurisdiction on facts identical to this case). When this case was filed, the Second Circuit had recently found merit in a Section 1985(3) claim nearly identical to respondents' claim. *New York NOW*, 886 F.2d 1339. Moreover, district courts in Maryland and the District of Columbia contemporaneously with the district court below reached the same conclusion that respondents' federal claims were sufficiently substantial to support pendent jurisdiction. *National Organization for*

[5] *See also* Oneida Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974); Siler v. Louisville and Nashville Railroad Co., 213 U.S. 175, 193 (1909).

Women v. *Operation Rescue*, No. 89-3098 (D. Md. Nov. 9, 1989); *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989). Petitioners even admit that existing case law did not foreclose respondents' federal claims. Pet. at 16, 18, 21.

Now that evidence has been taken and the state law claims have been decided and are unchallenged on their merits, the district court's exercise of discretion to grant judgment on them is all but unassailable. *Cf. United Mine Workers*, 383 U.S. at 728 (upholding pendent jurisdiction where federal claims "ultimately failed" but the Court could not conclude "that the federal issues were so remote or played such a minor role at the trial that in effect the state claim only was tried").

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

The Fourth Circuit's holding that gender-based discrimination violates Section 1985(3) is in accord with that of every other circuit to consider the issue. *Stathos* v. *Bowden*, 728 F.2d 15, 20 (1st Cir. 1984); *New York State NOW* v. *Terry*, 886 F.2d 1339 (2d Cir. 1989); *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366 (1979); *Volk* v. *Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Conroy* v. *Conroy*, 575 F.2d 175, 177 (8th Cir. 1978); *Life Ins. Co. of N. Am.* v. *Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Long* v. *Laramie County Community College, Dist.*, 840 F.2d 743, 750-52 (10th Cir.), *cert. denied*, 109 S. Ct. 73 (1988); *see Browder* v. *Tipton*, 630 F.2d 1149, 1154 (6th Cir. 1980).

This Court has also effectively ruled that Section 1985(3) protects women. *Novotny* v. *Great American*

Federal Savings & Loan Ass'n, 442 U.S. 366 (1979). There, although the Court did not explicitly decide the issue, its lengthy discussion of the interplay between Title VII of the 1964 Civil Rights Act and Section 1985(3) would have been wholly unnecessary if women were not a protected class. In addition, a number of justices of the Court have stated that they believe Section 1985(3) extends to discrimination against women. *United Brotherhood of Carpenters & Joiners Union* v. *Scott*, 463 U.S. 825, 853 (1983) (Blackman, J., dissenting) (four justices recognized that sex based discrimination "*per se*" satisfies Section 1985(3)); *Novotny*, 442 U.S. at 389 n.6 (White, J., dissenting) (three justices agreed that the majority correctly assumed that "sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3) . . . . ").

Unable to cite a single case that holds that women are not a cognizable class for Section 1985(3) purposes, petitioners argue that the inquiry here is not whether women are a class, but whether their opposition to "women seeking abortion" satisfies the animus requirement of Section 1985(3). However, this is a meaningless distinction for it is clear that class animus is established by proof of violence limited to those members of the class who attempt to exercise a protected right that defendants oppose. *See, e.g.*, *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). For instance, a Section 1985(3) claim based on denial to blacks of the right to vote could not be defended on the ground that blocking access to the polls was directed, not at all blacks, but only at those who tried to vote. The Second Circuit has squarely rejected petitioners' argument:

> "In most cases of invidious discrimination, violations of constitutional rights occur only in response to the attempts of certain members of a class to *do* something that the perpetrators found objectionable, such as traveling interstate with the perceived purpose of promoting civil rights. *See, e.g., Griffin*, 403 U.S. at 90, 91 S. Ct. at 1792-93. It is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights, but not against class members whose actions do not offend them."

New York State NOW, 886 F.2d at 1359-60. Similarly, the Seventh Circuit has held that a Section 1985(3) plaintiff "need not prove that there was an agreement to discriminate against an entire class of women." *Volk*, 845 F.2d at 1434.

Petitioners are not able to cite any appellate decision that accepts their specious distinction. The only two appellate decisions on the merits cited by petitioners are both from the Fifth Circuit and involve different allegations and legal theories.[6] In *Roe*, the

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[6] Petitioners also cite two district court opinions that purportedly hold that women seeking abortion are not a cognizable class and/or that blockaders have no animus against them. One of these cases was affirmed by an equally divided Eighth Circuit, but it did not even involve protests, much less coercive blockades at a medical facility. Lewis v. Pearson Found., Inc., No. 87-894 C(2) (E.D. Mo. Jan. 15, 1988), *rev'd*, 908 F.2d 318 (8th Cir. 1990), *vacated by an equally divided court*, No. 88-1293 (8th Cir. Sep. 7, 1990) (*en banc*). The other case is currently on appeal to the Ninth Circuit. National Abortion Fed'n v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989). Absent a conflict, there

plaintiffs alleged that the defendants "threatened, harassed, intimidated and assaulted" a class of "persons who do not share the anti-abortion religious beliefs of the conspirators." *Roe* v. *Abortion Abolition Soc'y*, 811 F.2d 931, 932, 935-37 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987). The court held that a class simply defined as those persons who disagree with the defendants is not cognizable under Section 1985(3). In *Mississippi Women's Nat'l Medical Clinic* v. *McMillan*, 866 F.2d 788, 790, 794 (5th Cir. 1989), the plaintiffs alleged that the defendants "create[d] an 'atmosphere' that intimidate[d]" a class of "women of childbearing age who seek medical attention" at the plaintiff clinic. The divided court assumed that this grouping was a cognizable class, but held—over the dissent of Judge Wisdom—that the plaintiff had "not shown that the protestors acted with an invidious discriminatory *animus* against that particular class. Rather, the record indicates that the protestors do not target their pro-life advocacy at any particular group." *Id.* at 794.[7]

Neither of these two Fifth Circuit decisions dealt with the allegations presented in this case, and in *New York State NOW*, that petitioners' blockading of medical facilities discriminated against women as a

is no reason to prevent the courts of appeals from considering the issues in these cases on their merits.

[7] To the extent that *McMillan* held that there is no Section 1985(3) liability where defendants' animus extends beyond a recognizable class to those who help the class members, it is erroneous. When Congress enacted Section 1985(3), it explicitly stated that the statute was intended to protect not only members of a traditionally disfavored class but also those whose activities supported the rights of that class. *See, e.g.*, Cong. Globe, 42nd Cong., 1st Sess. 487, 511, 517 (Apr. 5, 1871).

class. The plaintiffs in the Fifth Circuit cases neither isolated coercive, physical activity nor alleged that women were the relevant class. *See, e.g.*, *McMillan*, 866 F.2d at 790 (plaintiffs sought to prevent picketing and use of offensive language). The present case simply does not involve "pro-life advocacy" that—as found by the majority in *McMillan*—could be directed at anyone. The orders below seek to prevent blockades that are specifically intended to prevent women from entering medical facilities and exercising their constitutional rights. Finally, as noted, this case is identical in all relevant respects to *New York State NOW*, in which this Court denied certiorari notwithstanding these two distinguishable Fifth Circuit decisions. 110 S. Ct. 2206.

A conflict does not exist whenever courts reach differing results in cases in which different claims are advanced and different evidence is presented. The Fourth Circuit, as did the Second, endorsed two principles respecting enforcement of Section 1985(3): women as a class are protected, and wrongful acts directed at those class members who exercise the right objected to establish discriminatory animus toward the entire class. Petitioners have not identified a single appellate decision that has addressed these issues and decided them differently.

III. PETITIONERS' ARGUMENTS IN SUPPORT OF GRANTING A WRIT OF CERTIORARI ARE UNAVAILING

The decision below is fully consistent with prior Section 1985(3) case law and is an appropriate and limited response to petitioners' refusal to remove undeniably illegal coercive blockading from their repertoire of anti-abortion activities. In contrast to *Carpenters Union*, where recognition of a Section

1985(3) class would have extended the statute to virtually any political or economic dispute (463 U.S. at 836, 838-39), the decision below simply applies the statute to women—a group that has been traditionally recognized as a class entitled to special protection under the Equal Protection Clause of the Fourteenth Amendment and under various civil rights laws—who are physically prevented from exercising their constitutional rights. *See supra* at 9-13. This scenario falls squarely within the recognized confines of Section 1985(3), and absent a conflict among the circuits, review by this Court is simply unnecessary.

Petitioners advance a number of reasons for granting their petition in the absence of a conflict between circuits. Pet. 12-22. None have merit. Their claim as to absence of proof of class-based animus, Pet. 15-18, rejected by both the Second and Fourth Circuits, has already been shown above to pose no issue warranting this Court's review.

Particularly in the light of *Griffin* v. *Breckenridge, supra*, there is certainly no reason for this Court to review the holding of the court below that interference with interstate travel is a federal right protected by Section 1985(3). "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union." *United States* v. *Guest*, 383 U.S. 745, 757 (1966). Where, as here, individuals physically prevent interstate travelers from procuring the services of a lawful business establishment, they "actually deter such [interstate] travel" and violate the Constitution. *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opin-

ion). Discrimination between in-state and out-of-state residents has never been required; it is enough that out-of-state travel is impeded. *See, e.g., Crandall* v. *Nevada*, 6 Wall. 35 (1868) (striking down a state law that applied to both residents and non-residents alike). Moreover, contrary to petitioners' assertions, the Fourth Circuit's holding would not transform any "mass picket" or "sit-in" in a border city into a constitutional violation. As the plain language of the opinion makes clear, such symbolic efforts to persuade, unlike the coercive blockades at issue here, would not violate the right to travel.[8] *NOW*, 914 F.2d at 585, App. 8a.

Finally, of course, there is obviously no reason for this Court to review the exercise by the district court of its discretion to assume jurisdiction over the state law claims. Pet. 21-22. The basic legal principle is long-established and understood, and every appellate court that has had to deal with pendent state claims based on petitioners' blockading has properly upheld the district court's decision to assert its jurisdiction over them.

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[8] Petitioners also criticize cases in which lower courts have recognized a federal right to intrastate travel. Pet. 21. The court below did not rely on these cases, and their soundness is therefore not at issue here.

CONCLUSION

The Petition sets forth no basis on which the Court should review a decision that is obviously supported by adequate independent state law grounds, and that resolves the federal issue consistently with decisions of this Court and other courts. The Petition should be denied.

Respectfully submitted,

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